

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

Appeal of Stephen Andrews and John Carpenter

Docket No. 06-04-WC

RECEIVED

JUN 28 2006

OBJECTION TO SALEM'S MOTION TO DISMISS

NOW COMES the Appellant, Stephen Andrews, in this matter requesting that the Water Council deny the Town of Salem's Motion to Dismiss.

It is clear that Salem's attorneys have gone to great lengths in an attempt to recast this Appeal as an act of rulemaking, simply so that the Appeal might be dismissed on jurisdictional grounds. The Motion to Dismiss should be denied. Consider:


1. The Waiver Request is for relief from an existing rule - no language is proposed for a new rule, nor is the elimination of a rule proposed--the Appellants seek singularly "relief in its entirety" for the affected properties identified in Section I of the Waiver Application [the Appellants'] from Env-Ws 386(h)(4) due to the hardship caused.
2. The Original Waiver Request was filed under the authority of Env-Ws 386.04. The rule specifically provides for Waivers by the NHDES. Waivers are not considered "rulemaking."
3. Ws 386.04(d)(1) requires that waiver applications clearly identify the affected properties "including town, street address, and tax map and lot number." Only the Appellants' properties are identified in the Waiver Application.
4. The Appellants do not seek elimination of the rule, but do recognize that other waterfront properties may have similar rights, should the waiver be

granted. The Appellants are not so presumptuous, however, so as to argue their case(s) in absentia. Further, there is no *obligation* for lakefront abutters to seek a waiver—many have no interest in relief from the No Swim Rule. Conversely, many individuals likely *do not* have similar rights --the general public for one, is likely unable to seek a Waiver to the rule, as it is unclear how the public could demonstrate hardship. It is also unclear how commercially zoned properties might meet the specific waiver requirements, but these circumstances are not the Appellants' concern.

5. There is no requirement that Waivers be granted for a specific period of time as alleged by Mr. Graham. In fact, the newly updated rules adopted 11-30-05 state under Env-Ws 386.04(i): "If a waiver is granted, it shall be transferable with the affected property until the stated expiration date of the waiver, *if any* [emphasis added]."

WHEREFORE, this Appellant respectfully requests that the Presiding Officer DENY Salem's Motion to Dismiss.

Respectfully submitted this 27th day of June, 2006.

COPY


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CERTIFICATE OF SERVICE

I, Stephen Andrews, hereby certify that a copy of the foregoing Objection to Salem's Motion to Dismiss was this day mailed first class, postage prepaid to: Esther Piszczek, Office of the Attorney General, 33 Capitol St., Concord, NH 03302; Gordon Graham of Soule, Leslie, Kidder, Sayward & Loughman, 220 Main St., Salem, New Hampshire 03079; and John Carpenter, 44 Woodvue Rd., Windham, NH 03087.

By: _____

Stephen Andrews

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